UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 04-4362-SRC

DENISE AGOSTINO, et al., MOTIONS

Plaintiffs,

vs.

QUEST DIAGNOSTICS, INC., et al.,

Defendants.

September 7, 2010
Newark, New Jersey

B E F O R E: HONORABLE STANLEY R. CHESLER, USDJ

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

S/Jacqueline Kashmer
JACQUELINE KASHMER
Official Court Reporter

JACQUELINE KASHMER, C.S.R.
OFFICIAL COURT REPORTER
P. O. Box 12
Pittstown, NJ 08867
(908) 229-6496

A P P E A R A N C E S:

TRUJILLO, RODRIGUEZ & RICHARDS, LLP
258 Kings Highway East
Haddonfield, NJ 08033
BY: LISA J. RODRIGUEZ, ESQ.

and

WHALEN & TUSA, P.C.,
33 West 19th Street - 4th Floor
New York, NY 10011
BY: JOSEPH S. TUSA, ESQ.
For the Plaintiffs

REED SMITH, LLP
Princeton Forrestal Village
136 Main Street - Suite 250
P.O. Box 7839
Princeton, NJ 08543-7839
BY: MARK S. MELODIA, ESQ.
DIANE BETTINO, ESQ.
For the Defendant Quest Diagnostics, Inc.

GARRITY, GRAHAM, MURPHY GAROFALO & FLINN,
72 Eagle Rock Avenue - Suite 350
East Hanover, NJ 07936
BY: PETER CIPPARULO, ESQ.
For the Defendants American Medical Collection Agency, Russell Collection Agency, Credit Bureau Central, Quantum Collection, Seattle Service Bureau, Inc.

THE CLERK: Agostino vs. Quest Diagnostics, 04-4362. Please note your appearances for the record.

MR. TUSA: Joseph Tusa from the firm of Whalen & Tusa for the plaintiffs, your Honor. Good morning.

MS. RODRIGUEZ: Good morning, your Honor. Lisa Rodriguez also for the plaintiffs.

THE COURT: Good morning.

MR. MELODIA: Good morning, your Honor. Mark Melodia from Reed Smith for the defendant Quest.

MS. BETTINO: Good morning, your Honor. Diane Bettino, also from Reed Smith and also on behalf of Quest Diagnostics.

MR. CIPPARULO: Good morning, your Honor. Peter Cipparulo from the law firm Garrity, Graham, Murphy, Garofalo & Flinn on behalf of the defendants American Medical Collection Agency, Russell Collection Agency, Credit Bureau Central, Quantum Collection, Seattle Service Bureau, Incorporated.

THE COURT: And Mr. Cipparulo, they've disowned you over there. They've made you --

MR. CIPPARULO: I just like to be as far away from the fray as possible, your Honor.

THE COURT: All right.

MR. CIPPARULO: Thank you.

THE COURT: Okay. Who's going to be arguing for

plaintiffs?

MR. TUSA: I will, your Honor.

THE COURT: All right, Mr. Tusa. It's your motion. I'll hear you.

MR. TUSA: Thank you very much. Does your Honor prefer we use the podium?

THE COURT: Wherever you are comfortable.

MR. TUSA: If it's okay with your Honor, I'll stay at counsel table. I'm fighting a little bit of a cold. If you need me to speak up, please let me know.

With your Honor's indulgence and permission, I may be referring to some hearing exhibits we brought with us. I prepared a packet of them. May I hand it up? I have plenty.

THE COURT: Sure. Make sure opposing counsel has copies. Thanks.

MR. TUSA: These are the same charts.

THE COURT: Okay. Thank you, Mr. Tusa.

MR. TUSA: Thank you, your Honor. As your Honor is aware, this is plaintiffs' renewed motion for class certification. We had made a motion about three years ago.

About a little more than a year ago, February 2008, I believe, your Honor decided it, denying class certification.

From plaintiffs' perspective, I think the first thing

I could say is, you know, we took your Honor's opinion very seriously. We abided by it very closely. My colleagues and I spent a good amount of time deciding whether or not we should seek 23(f) appeal.

Your Honor wrote an extraordinarily in-depth opinion and after reading it, we decided it was, in fact, a road map of how we could perhaps renew our motion.

I think what came through in your Honor's first opinion, came through crystal career, you thought we bit off too much. You thought we tried to go after too much, too many legal claims, too many practices. I think that came through crystal clear to plaintiffs and I sort of want to start out where defendants' opposition starts out, with this notion that somewhat gets mixed up that either we weren't allowed to make a renewed motion for class certification or that, if we were, it's nothing more than a retread of our --

THE COURT: We'll stop that. All right. There's no doubt that you're allowed to make a renewed motion. All right. And indeed, look, my comments when we had our informal conference were really directed at two issues; one which was, yeah, you took a good long time to look over what you wanted to do with this complaint, about a year.

And secondly, as I commented, the fact that Judge Dickinson Debevoise and I came out with different analysis

on choice-of-law issues is not a basis for a reconsideration motion.

And I will tell you today that that is a view which I continue to adhere to. To the extent that there is, you know, a difference of opinion between Judge Debevoise and this Court, if it ultimately has to be resolved, it will be resolved by the Third Circuit Court of Appeals.

But, quite frankly, you indeed have a different class that you are defining at this point and that raises different issues to some degree. So, let's get both of those out of the way. All right?

MR. TUSA: Fine. Good. That, I mean that clears the slate and brings us exactly to where we want to start.

Leaving aside, and we agree a hundred percent about the right to make a new motion, our first hearing exhibit, your Honor, and I'm not going to belabor the point at this point in time, goes through the differences between the first motion and the second motion because -- a number of reasons.

You know what, those differences are what are at issue today and in this present motion, I think one of our pointed critiques of the defendants' oppositions is they somewhat relive the past.

A good amount of their opposition brief, for instance, likes to talk about individual issues that they

believe still need to be addressed, citing very liberally your Honor's first opinion talking about, for instance --

THE COURT: You're all very good at citing those portions of my opinion which favor you.

MR. TUSA: I'm sure we do. I'm sure we do, your Honor. That all being said, your Honor has another comprehensive set of briefs in front of you. We were not intending today to go through all of those points. You have our briefs.

I want to just pick up on just a few of the items, perhaps raise a few issues that have come to light in the court decisions since we've briefed it and, of course, and most directly address any questions your Honor has.

So, like I say, the exhibit chart number one is really the differences between the first and the second motion, and some of them are quite pointed.

For instance, in the first motion, your Honor, we were seeking both a (b)(2) and (b)(3) classes. We no longer seek (b)(2) classes. We no longer seek injunctive remedies. We no longer seek equitable remedies.

THE COURT: In other words, you decided you're not going to try for belt and suspenders.

MR. TUSA: We are not going to try for belt and suspenders. Again, I say, your Honor, we read your opinion very closely and while I won't stand up here and say my

colleagues and I agreed with it all, we read it and, for instance, we limit all of our classes to only those people who have ascertainable out-of-pocket losses.

No longer do we say somebody is going, you know, just because they were billed in an inappropriate way, should they be in the class.

The one exception to that is for the debt collector class, the FDCPA does recognize a statutory violation, and that's a small part.

Last time, the first chart I showed your Honor were nine Quest pre-EOB billing practices. Save for billing of Medicare patients, we don't rely on any pre-EOB billing practices anymore.

We pick up from where defendants and their experts and their counsel last time said one needs to pick up, from the issuance by the insurance company of an EOB or an EOB that's electronic is called an ERA, electronic remittance.

For today's hearing, your Honor, I will just use the term EOB but I will be referring to the electronic version and the regular version.

We no longer seek any class for ERISA. We no longer seek any class for common law fraud. We only have one class that seeks breach of contract under one state law. That is our Anthem Blue Cross Blue Shield class. It relies on one provider agreement, that provider agreement being

Quest, Anthem Blue Cross Blue Shield, and one sub-plan, because your Honor was pretty clear last time that there are a lot of provider agreements, there could be sub-plans within provider agreements and that could cause additional manageability and predominance issues, so, we have limited that class now, Anthem Blue Cross class. One provider agreement, one sub. That sub-plan being the Federal Employees Health Benefits program.

And why that one? Because our class rep, Mr. Grandalski, was a member of that plan and that sub-plan. He was a 37-year employee of the Department of Agriculture, retired now, retired as the director of civil -- I think assistant director of some civil compliance, now in retirement works for the United States and the World Bank. That's why that's the plan. That's why that's the sub-plan.

Our choice-of-law analysis, you touched on it before. I am not going to stand up here and try to change your Honor's mind on the choice-of-law standards. You have our briefs.

The one additional thing I would add to our briefs is the Third Circuit's opinion in Cooper v. Samsung. We think it adds quite a bit.

THE COURT: I'm just curious how -- first -- actually two things. First of all, and I will candidly caution both

of you, when the Third Circuit issues a non-precedential opinion, the Court, of course, is going to examine it for its persuasive authority, but that's what it is.

The Third Circuit has repeatedly cautioned district courts they are not to treat non-precedential opinions as if they were precedential opinions.

Indeed, if I take a look at that opinion, if I recall correctly, two of the three judges who authored that opinion are on senior status, and the third judge dissented and actually, as far as I can see, it is a dissent which most strongly favors your position because the dissent, in fact, seems to take the position that Judge Debevoise, in Mercedes-Benz, got it right and that the issues which Judge Debevoise focused on in Mercedes-Benz, if we were going to use subdivision two --

MR. TUSA: Right.

THE COURT: -- would have warranted at least a very careful consideration of New Jersey law as being the choice of law.

The other two judges using subdivision two said taking a look at all these factors, we still end up with -- I forget which Midwestern state it was --

MR. TUSA: Arizona.

THE COURT: -- Midwestern state substantive law applies, New Jersey's Consumer Fraud Act does not get extra

territorial effect and will not be able to export its civilizing aspects to benighted sections of the country.

MR. TUSA: Your Honor's recall is a hundred percent correct and, again, it wasn't my intention to belabor that aspect of our choice-of-law opinion today.

THE COURT: Okay.

MR. TUSA: I know it's an area of interest to your Honor and your Honor was correct in the opinion.

We cite, of course Cooper is an NPO opinion, as is Nafar, which the Third Circuit also slightly dipped its toe into these issues as well.

THE COURT: And in fact, if you folks have been paying very careful attention, the Third Circuit vacated the decision in DeBeers.

MR. TUSA: Yeah.

THE COURT: And is going to hear it en banc, and that could create one of the more interesting issues about choice-of-law analysis, although of course, as you're all fully aware, that the choice-of-law issue, coupled with what is -- well, not coupled with an issue which is present here, which is manageability.

MR. TUSA: We, of course, read your Honor's opinion in Sullivan. We read the Third Circuit's pre-vacation opinion in Sullivan and the order vacating it, and your Honor is right, the Third Circuit is going to continue along with

its instructive analysis in the area of certification of multi-state classes.

You know, obviously they're at the vanguard of this issue back when they decided the Prudential sales litigation in '98. They added something to it in the Warfarin analysis I believe in 2004. Again, those were both settlement opinions, in where both instances the court said, sure, you can group the multi-state.

Now, those were settlement classes, so, admittedly they didn't have the touch on manageability and superiority, but the Warfarin court, and I believe -- yeah, the Warfarin court, and I'm trying to remember the decision afterwards, were careful to say just because you have multiple states and you see certification in multiple states, you are not going to run afoul necessarily of predominance and commonality.

Of course, and plaintiffs acknowledge this, there is a burden to be shouldered if you are the plaintiffs and you seek a multi-state class certification, as we do for at least one of our legal claims. The burden is on us to show you that it is manageable in a non-settlement context and to the extent predominance and commonality and typicality come into play, certainly those as well.

If it's okay with your Honor, I'm going to put choice of law aside for the moment.

THE COURT: Okay. Except let me ask you one other question.

MR. TUSA: Sure.

THE COURT: You cite a couple of cases which essentially assert -- all right -- and on the choice of law issue, of course, the key is the Consumer Fraud Act and whether or not it can be applied to a nationwide class.

Your alternate B is groupings of consumer fraud type statutes, and I've read your briefing on that, on both sides.

Alternate C, I will tell you, I've read those opinions. Exemplars, what are exemplars? Are these test cases they're talking about?

MR. TUSA: You're making reference to the Relafen opinion and the Carzem opinion?

THE COURT: Yes.

MR. TUSA: The federal judges in Relafen, District of Massachusetts, which was Chief Judge Young, and I'm trying to recall the judge's name in Carzem way back when it was a case -- I'm sorry, escapes me at the moment -- faced with a multiple state certification, these were primarily cases that challenged pharmaceutical drug pricing.

THE COURT: And they're antitrust cases, and they're antitrust cases and they -- the problem was national class, was a federal antitrust case and the problem with state

class, state antitrust certification was Illinois Brick and Illinois Brick Repealers. Gee, sounds like DeBeers.

MR. TUSA: Sounds a lot like DeBeers. As your Honor is most acutely aware from your DeBeers experience and perhaps others, the Illinois Brick Repealer states have been entered not nationwide. It's a decision certain state legislators have made and, more to the point, some state legislators, some state courts recognizes Illinois Brick Repealers, some in the antitrust statute, some in the consumer protection statute.

THE COURT: I'm trying to understand what this Court did. They certified a national class on federal antitrust claims and did not certify a national class on state antitrust claims.

MR. TUSA: Your Honor asked whether there was --

THE COURT: And what did they do?

MR. TUSA: Well, your Honor asked if they certified a test case. It seems to me that they did certify a test case. They wanted to take the case through the pretrial phase using the test case. They're going to try it, that case, and assuming it worked out for the plaintiffs, then the court apparently was going to deal with the remainder of the certifications.

I could tell you in both cases it never got to that because the cases settled.

THE COURT: Okay. But let me ask you this. If I were in theory to do that -- well, let me take it back. Step back.

MR. TUSA: Sure.

THE COURT: Let's take those test cases. Suppose they certify a national class, a federal antitrust Sherman violation act, if I recall correctly.

MR. TUSA: Sure.

THE COURT: All right. And they certify six exemplar states and they try state antitrust claims against remote -- involving remote purchases in those exemplar cases. Now, the view is then towards coming to a settlement. Correct?

MR. TUSA: I can't necessarily put myself in Chief Judge Young's head. I imagine it certainly was a factor in it, although I don't know why exactly he did --

THE COURT: Well, exemplar cases are typically used in cases which have been consolidated by the panel on Multi-District Litigation to, in fact, see whether or not there is a pattern that can be used to do overall mass settlements. Correct?

MR. TUSA: And both of those were JP MDL cases.

THE COURT: Okay. Now, my question is suppose you did some exemplar cases in those antitrust cases.

MR. TUSA: Sure.

THE COURT: And suppose the remote purchases did well and got recoveries in those test cases.

If the panel decision in DeBeers were to stand, there would still be no possible settlement, would there, because at its core, the panel decision in DeBeers says you can't do a class certification for a class where members of your class have no cause of action whatsoever.

MR. TUSA: That is what's -- that is some of what Sullivan says, your Honor. Yes, your Honor.

THE COURT: Look, if I put Judge Jordan's holding in plain English -- all right -- that's what it says. It says I tried to put apples and oranges together in this settlement.

MR. TUSA: Well, I'd answer a couple fold, your Honor. I don't disagree with your Honor's reading of it. In reading the panel decision in Sullivan, I think my colleagues and I -- I speak for myself if nothing else -- thought it was a little odd that the body of the decision said that and in the footnotes would commonly say but we're not saying this could never happen just on these facts.

Now, I don't -- let me say something. I don't disagree with -- I don't disagree with both Judge Jordan's, and to the extent your Honor agrees with Judge Jordan's comment, that you can't allege a class from a state statute where there is no claim. And for instance, let me just

suggest, we have suggested grouping the statutes in two groups, your Honor, and we don't have all the state statutes.

There are nine states that we have no statutes for. Why is that? Because there either is no private right of action, ala Iowa under its separate practice statute. Some state separate practice statutes don't allow class actions; Alabama, Mississippi, South Carolina. They're not in our grouping.

So, I don't disagree with your Honor that you can't include in your state-by-state grouping analysis states where there's no cause of action. I don't agree with that. I think we took care in our grouping analysis for the states' separate practice statutes to only include those statutes where there is a private cause of action and class actions in particular are permitted.

Of course we don't draw on a blank slate. There are any number of opinions. You know that we relied somewhat heavily on Judge Saris' opinion in AWP. Seventh Circuit has recently done this in Pella, to a lesser extent. Correct.

We submitted to your Honor a compendium from the National Consumer Law Center, all 51 -- actually, it's more than 51 because they include some of the United States territories like the Virgin Islands and Guam, all of the

states' separate practice statutes we submitted, that's 2009 compendium, so, we took a very close look at those consumer protection statutes, only proposed those that we thought there was a private cause of action on these facts.

So, I don't disagree with your Honor that -- and I don't think plaintiffs' propose state separate practice claims for a state where a claim -- this is not a settlement class, certainly not this juncture, and so, we were careful to abide by that.

I was going to move on but let me just stick with choice of law for just a moment to mention -- I think your Honor said, and your Honor is right, the way the new motion has broke out, choice of law really only applies to one of plaintiffs' state claims. That is the state consumer protection statutes.

We no longer seek any class for common law fraud. Our breach of contract is limited to one contract and one state, that's Connecticut. And your Honor has previously held, and nobody has disputed at least on this motion, that unjust enrichment law is not conflict driven and therefore we could apply New Jersey law nationwide.

So, the only state claims for which we proffer classes on are the state consumer protection statutes and admittedly we are at odds with defendants on the proper choice of law.

Your Honor has correctly also noticed we proffered three ideas, New Jersey, CFA nationwide. Your Honor has made himself clear on that.

I mentioned Cooper. Fair enough. I just want to mention two other cases just so it's in the record.

We think the Supreme Court's decision in Hertz v. Friend has some bearing on this, and there have now been at least two district court opinions, including the Federal Circuit last week, that relied on Hertz v. Friend in conducting its choice-of-law analysis.

THE COURT: Okay. Well, I will tell you that, and with the greatest respect for the Fed Circuit --

MR. TUSA: Federal Circuit, but yes, your Honor.

THE COURT: Yeah. With the greatest respect for the Federal Circuit, I don't buy it.

MR. TUSA: Okay.

THE COURT: I mean Hertz, you read through Hertz -- look, they admit in the end that they have made a decision predicated in large part on expediency. They want a bright line test for jurisdictional purposes. They recognize that there are theoretically any number of different bases which would be used to determine the principal place of business of a corporation.

They chose a test which, in fact, would not have the district courts trying to figure out how many angels dance

on the head of a pin every time they've got a subject matter jurisdiction issue. And I mean, if you read the subtext of the opinion, that ultimately is the rationale for it, not some sort of overarching scheme about what constitutes the location of a corporation for all purposes generally.

MR. TUSA: Listen, your Honor's made yourself clear on this. We won't belabor --

THE COURT: Let me ask you, am I wrong?

MR. TUSA: Listen, the Supreme Court was dealing with a common problem the Supreme Court always deals with, different circuits reaching different conclusions on a, in this case, threshold matter, subject matter jurisdiction.

By choosing the nerve center test as they chose it, yes, part of it was expediency, but they could have just as easily for expediency purposes chose one of the alternative proffers and they thought nerve center test where the officers of the corporation made corporate level decisions, that really, you know, from their principal place of business, they thought, yes, expediency was one part of it, but that was the one that I can only imagine a unanimous Supreme Court decided made the most logistical sense.

Now, mind you, your Honor, it was diversity jurisdiction. We don't pretend to stand up here and say it was a choice-of-law opinion. However, it's a fairly new

opinion, January 2010, I believe, and already the district courts are using it in their restatement of conflict-of-laws analysis because one of the subsections, whether you use subsection one or two, has to do with where the statements are being emanating from.

Your Honor may not agree with that, but to the extent that your Honor is asking our opinion --

THE COURT: Okay.

MR. TUSA: -- we do believe Hertz bears on it for that way. But your Honor seems to have very definite and strong feelings on that subject and I don't want to belabor this morning's argument.

THE COURT: I have very definite and strong opinions that you don't take a Supreme Court decision which is designed and intended to deal with a very specific pragmatic issue which has been deviling the federal courts for decades now and say, oh, they have come up with a Rosetta Stone and apply it to all sorts of other situations where they didn't even purport to voice an opinion.

MR. TUSA: Fair enough, your Honor.

THE COURT: Okay.

MR. TUSA: I do. For the time being and perhaps the rest of this hearing, I'm going to move off choice of law. Maybe I'll come back if your Honor has more questions.

THE COURT: Okay.

MR. TUSA: Okay. I probably will want to circle back to some of our grouping analysis a little bit later.

Okay. So, our first chart today was not so much for just the point that we can make a new motion, we wanted to make it very clear that we put a lot of thought and care into reading your Honor's opinions and these are all new aspects of our motion.

I want to sort of segue at this point in time into one of our classes, the post-EOB billing class. That is the one -- this is hearing chart two for those following at home and, your Honor, we read not only your Honor's opinion but defendants' statements in their briefing, their expert statements and the hearing transcript, and uniformly what they said, and we have excerpted some of their statements in this hearing exhibit number two, is if you want to talk about patient billing, you cannot start before issuance of the EOB.

The EOB is the critical document, according to defendants, that tells Quest if it can bill, when it could bill and how much it could bill.

And excerpted on hearing chart two is, we have statements from Quest, from their counsel, from their expert. They say uniformly the EOB is the critical document, the one that Mr. Melodia said last time we could take it to the bank that what is on the EOB is the amount

the patient owes, nothing more, nothing less.

Fine, we said. We're limiting our class, our EOB billing class, to just those people who were billed after the EOB in an amount in excess of what the EOB said was patient's responsibility, and because your Honor's ascertainable loss statements and opinion, only those people who paid in excess of what they owed.

Now, the defendants said, well, nobody should be billed above the EOB. That's what their statement said, and, yet, in their opposition to our present motion, somewhat astounding to plaintiffs, they say there are tens of hundreds of thousands of people who fit into this class. By the way, tens of hundreds of thousands of people is millions to us.

It's quite an astounding thing to hear them say after they repeatedly told your Honor nobody should be billed -- the EOB is the document. The insurance company is the adjudicator. It's the one we rely upon. It's the one that summarizes the provider agreements, the patient's benefit plan, all of those things.

It's the one that we relied upon and, yet, now they say there may be millions of people who were billed in excess of EOBs and who paid in excess of EOBs.

THE COURT: Well, then you satisfied numerosity.

MR. TUSA: Thank you, your Honor. I don't think -- I

don't believe that one is contested.

Not to be too glib about this, what defendants do say is you haven't solved the problem because we -- before we criticized you for relying on the provider agreements and the state separate billing laws, and now they say, oh, no, now you got to look at those again.

In some respects this is a sort of damned-if-you-do, damned-if-you-don't approach by the defendants.

We did what they said. We did what the Court said. We defined our class running from the EOB and we're only including people like Mr. Grandalski, who is our class rep, who was billed afterwards in excess and paid.

Why did they pay? They got a bill from Quest saying they owed the money. You could read the statements from their own expert, Dr. Dyckman. It's the last quote on our charge.

It says, "In addition to the requisition, the EOB is of critical importance in regard to laboratory patient billing. It instructs the laboratory whether to bill the patient and how much to bill the patient based on the patient's benefit coverage and the pricing provisions of the payer's contract with the laboratory."

He doesn't say and, of course, in practice Quest doesn't have to pull out its provider agreement every time they bill a patient. That's not what happens. They rely

on the EOB.

So, for them to now say we couldn't possibly have an EOB -- a post-EOB billing class without looking at the provider agreements and the state anti-balance billing laws, it's not only disingenuous, it's not what they do in practice. They do bill everybody based on the EOBs.

Now, they said there are millions of people in this class. What they didn't say and what we expected them to say is, listen, we may screw this up but in the days and weeks that follow, we fix it because we eventually can match everything up and we fix it.

Indeed, you know, their director of technology, this gentleman, Mr. Hanlon, had said, and we quoted this as well in our reply brief, he says, "For every claim, we know all cash and adjustments and whether or not the cash that was logged was insurance cash and patient cash."

But we didn't see a defense from Quest that they gave the money back. So, what we have is a scenario and class here where all of these people like Mr. Grandalski, who is our rep, was billed in excess of what his insurance company told Quest they could bill him. He paid it. He never got his money back.

I should mention that this is not the first time he's complaining about this. Mr. Grandalski complained to the company and to their debt collectors, Quantum and CBC, who

Quest used to chase him and his wife down four times for ten extra dollars.

When those complaints hit a brick wall, he complained to the Nevada Attorney General because he was living in Nevada at the time. He was posted to Nevada.

The Nevada Attorney General -- I know your Honor is not keen from our last hearing on hearing what state officers say about these kinds of things, but the Nevada Attorney General decided that what Quest did to Mr. Grandalski and what the debt collectors did to Mr. Grandalski was, quote, unquote, "illegal deceptive practice."

They told -- their counsel told Nevada Attorney General they were going to refund Mr. Grandalski's money. They never did. I don't think that point is at issue, either, and I sort of just want to highlight Mr. Grandalski's experiences a little bit because he is the plaintiff for three of our four classes.

So that's my hearing chart number three, your Honor. Four dates of service. He was insured by Anthem Blue Cross Blue Shield every time, which dovetails into our Anthem Blue Cross class. The date of the EOB and the amount the EOB is set. In every case there was $20, that was his co-pay.

The date the EOB was -- if you notice the date that

either Quest or one of their two debt collectors, Quantum or CBC, billed him, are months after the EOB was received. And what they did is they tacked on an extra ten bucks because they decided they had to send it to their debt collectors and they were going to tack on an extra ten bucks.

That dovetails a little bit into our FDCPA claim, but more on that later.

Their own expert, Dr. Dyckman, says this look like this was a problem. Your Honor, in your prior opinion, noted the fact that Quest did not deny that the last time around we called a similar class this, which for the equity were remedy subclass, we had bankruptcy people shoved in there. Your Honor didn't like that. We threw the bankruptcy people out.

Your Honor noted that defendants don't contest Mr. Grandalski as a member of this subclass who was billed after the EOB in excess of the EOB and paid. So, that's our class rep.

We don't possibly see -- you know, listen, we think that we meet all of the Rule 23(b)(3) and (a) criteria for this EOB billing class. We don't possibly see how we cannot.

Defendants raise one of the most rogue defenses that you normally see. They're, like, well, everybody's damages

will be different. Yes, that's true, but that is hardly ever a reason to deny class certification. There are opinions ad nauseam stating that fact.

And otherwise, they generally rely on the fact that they think they are going to have to go back and pull provider agreements and look at state balance billings laws which they continually told you -- well, they certainly did tell you when we sought out prior classes that they didn't have to do. They said the EOB was the important document.

This is a common issue. It's a common problem. It's a unitary -- it's a unitary claim on behalf of this class. We think it satisfies predominance.

As far as superiority goes, your Honor made note of the fact Mr. Grandalski was overcharged ten dollars. You know, it's an amount that is so small, that nobody is otherwise going to sue on its own behalf for ten dollars. It happened to him four times.

I'm, of course, reminded of Judge Posner's decision in the Carnegie case, only a lunatic or fanatic sues for ten dollars. The alternative to a class action are not in that case 17 million cases, but no cases. Nobody sues for ten dollars, certainly not a corporate behemoth like Quest. It's just not worth it. The only way this is viable is in a class context.

THE COURT: Let me ask you a question.

MR. TUSA: Surely.

THE COURT: If I recall correctly, this gentleman is a class rep for all the classes except for the --

MR. TUSA: Medicare.

THE COURT: -- the Medicare class. Okay. Let's take the RICO class.

MR. TUSA: Yeah. Well, the RICO claim. There's not a RICO class.

THE COURT: Okay. The RICO claim. Okay. Now, the RICO claim is predicated upon multiple mail frauds as the predicate offenses. Correct?

MR. TUSA: Mail and wire fraud, yes, your Honor.

THE COURT: Okay. And of course, that requires scienter.

MR. TUSA: Yes. Of course, your Honor.

THE COURT: Now, I'm trying to -- I was trying to identify exactly where in the complaint you had described the scheme and artifice to defraud that was engaged in by Quest, and I do recall seeing it had a number of points that constituted the scheme and artifice to defraud.

MR. TUSA: Yes, your Honor.

THE COURT: Including at its core billing when you weren't entitled to bill.

My question is this. Now, to make out this claim, ultimately you're going to have to demonstrate that, in

fact, Quest possessed the requisite scienter.

MR. TUSA: Yes, your Honor.

THE COURT: And I'm trying to really in my own mind sort of scope out what the scheme is or, more particularly, is it pleading the scheme. And here is what is hitting me from looking at the pleadings.

There's no doubt that you indeed make factual assertions that they billed people in excess of their EOBs. On the other hand, there's also no doubt that thousands of people, tens of thousands of people, hundreds of tens of thousands of people, in defendants' words, were not billed in excess of their EOBs.

So, I am trying to see how the complaint in fact describes a scheme or artifice to defraud because the complaint does not suggest any particular rhyme or reason as to why Quest, when it sends out bills, sends out bills with a flying fickle finger of fate, ends up with me getting a bill in excess of my EOB and Miss Trivino, sitting 30 feet away from me, she gets perfectly fine bills.

I mean, and the complaint does not really describe something other than frankly the result, which is lots of people get EOBs and they get billed for amounts over their EOBs. Others don't. And I'm sitting here, particularly in the context of trying to figure out, well, how do we go

about actually managing this case? How do we prove a scheme? What constitutes the kinds of proofs that would, in fact, prove a scheme which had in fact the requisite scienter to constitute a criminal violation since, as we all know, while you've got a civil RICO, all that is is a civil remedy to a criminal offense and you, in fact, have to demonstrate that the criminal scienter existed.

Now, explain that to me, how this becomes, in fact, something which is manageable and, perhaps more significantly, how this is a class other than a class of people who are described by virtue of, in fact, having been found to have been victimized. In short, not a discrete class as it were.

MR. TUSA: Your Honor asked a lot in your explanation. I'll try to answer as best I can.

I think your Honor inherently asked a pleading question and a class question. You asked where in our complaint -- I presume your Honor was looking at the operative first amended class action complaint I believe filed in 2005, before any discovery was taken.

THE COURT: Actually, I was looking at the second amended --

MR. TUSA: The proposed, yeah, the proposed amended pleading. That's the one we submitted, of course, with our motion for intervention. As your Honor is aware, Rule

24(c) requires us to submit that.

Now, I will tell you, save your Honor for updating the class allegations and the dates of issue of service, given Judge Lifland's motion-to-dismiss opinion, we did not substantively change most of the allegations in that complaint. We certainly could.

I mean, of course, we're aware, and we have not at this point in time tried, your Honor. Rule 15, we can conform the complaint to the evidence. We haven't tried to do that. There hasn't been a suggestion -- well, firstly, discovery is still in the middle, but we haven't had -- there's been not a suggestion --

THE COURT: Let's assume that you do. Let's assume you do that, you amend the complaint to, in fact, assert that there's a scheme and artifice to defraud patients who go to Quest by billing them for amounts in excess of the EOBs which were electronically issued by their respective insurers.

MR. TUSA: And I think your Honor asked the same question probably two years ago when we were here on our last motion.

THE COURT: Did I? My memory isn't that good anymore. That's what happens.

MR. TUSA: And of course, I think the answer is dramatically different for those classes than it is for

this class.

Last time we said, what is the -- Quest has these nine corporate billing practices that ultimately are the result of all of these billing problems. They are all pre-EOB issuance. Okay.

And if I remember -- and I'm paraphrasing your opinion now -- you said those were nothing -- billing mistakes happen for a variety of reasons, I believe was your Honor's quote or paraphrasing, and pre-EOB --

THE COURT: Not with me. With me, they're, as far as I'm concerned, the improper bills I get are a conspiracy, but I don't know about the rest of the world.

MR. TUSA: I understand completely, your Honor. So your Honor took us to task last time, and I think in your Honor's opinion -- and certainly this was defendants' position -- that pre-EOB, billing mistakes happen for a company this large who does this many transactions, your Honor was willing to cut them the benefit of the doubt.

I don't think plaintiffs were. I think they should do their job better and if they don't do their job better, they should have to be responsible for mistakes they make.

Your Honor was not of that opinion, I think it's fair to say, in the pre-EOB world. In the post-EOB world, I think it's dramatically different. Okay. Quest has said, their counsel has said, their experts have said, how does

Quest know what the right number to bill is?

They had actual knowledge when they get the EOB, actual knowledge, and if they don't have actual knowledge, they've recklessly disregarded it.

Page 27, footnote 11 of our opening class cert. brief we cite a gentleman by the name of Gerald Diffley. He's defendants' director of corporate compliance. He said all the EOBs or ERAs come in at one central place, a department they call remittance applications is what Quest calls it.

One department gets all of these things. They then turn around, if the EOB tells them they could bill, they bill. They use a billing vendor, this outside company that we have made reference to called Regulus. Quest doesn't actually send out their own bills. They send a very, very large electronic file to this billing vendor, I believe once or twice a day. This billing vendor, Regulus, actually sends the bills, I believe the testimony was, from somewhere in the Midwest.

Now, we may be able to cut them some slack in the pre-EOB world. In the post-EOB world, there is absolutely no excuse to give them the same degree of respect. They have what they have self-described as the critical document in their hands to know the amount of the bill, the EOB, the ERA.

For all of the people in this class, they are making a decision, either with knowledge or with actual disregard for the piece of paper they have in their hand, as to what this person owes and when they owe it.

Now, Quest has decided and it uses debt collectors and it uses this outside billing vendor, Regulus, that they are not necessarily going to either in all instances comply with the EOB or spend the right amount of time in setting up the right compliance procedures to do it.

Now, I'm not -- we have -- you asked me what about people who they didn't mess up. They're not in a class. We're not looking to include those people.

THE COURT: I understand that.

MR. TUSA: Okay.

THE COURT: But my recollection is, and I may not word it as articulately as I would like, but my recollection is that in defining a class, as a general rule, one can't define a class by saying we're going to define the class by determining in fact which members have been victimized by a practice; that there has to be some unifying theme apart from the fact that there is victimization, certainly at least as to a Rule 23(b), a money damages class. Injunctive class may be somewhat different.

So, for example, you've cited to me Judge Hochberg's

decision and the Third Circuit's decision in the UCR cases. You're familiar with them. Correct?

MR. TUSA: I'm sorry. What does that stand for?

THE COURT: UCR is usual and customary --

LAW CLERK: Usual and customary rate.

THE COURT: Usual and customary rates. It was a class action in which the allegations were that the insurance companies were routinely using a database for determining what the usual and customary rates for medical practitioners in a particular area were, which where prepared, if I recall correctly, the allegation is by a company called Egenix or Ingenix.

MR. TUSA: I'm familiar.

THE COURT: And the allegation was and is, because I have some of these cases --

MR. TUSA: Yeah.

THE COURT: -- that this database was intentionally played around with and that, in fact, the actual usual and customary rates on an average were much higher than this company reported, that the insurance companies were in bed with the company and, therefore, everyone who was out of network and who submitted a claim got reimbursements at a much lower rate and the doctors got a much lower rate.

Now, there's a scheme. All right. There's a unifying theory, might prove to be true, might prove to not

be true, but the unifying aspect of that was an allegation that this database was in fact manipulated to lower across the board in various geographic areas the calculation of what the usual and customary rate of various practitioners were and, therefore, people who got billed based upon that ended up arguably being victimized. Now --

MR. TUSA: I believe your Honor is referring to the Wachtel case.

THE COURT: Yes. Indeed, and you cited Wachtel.

MR. TUSA: Not in these briefs, we didn't, your Honor, but in our -- I believe now you're testing my memory.

THE COURT: Actually, I think you got Wachtel in here also, if I recall correctly. That's vague recollection but we don't have to test my memory. You may only prove that it's failing.

MR. TUSA: That's fair, your Honor.

THE COURT: What I'm trying to understand is -- okay -- look --

MR. TUSA: Sure.

THE COURT: -- I understand that you are indeed pleading a particular result, which is that people got overbilled. All right. And you certainly are suggesting that it was the result of improper conduct. But the complaint doesn't particularly allege what conduct -- what

scheme it is that results in this injury, and I'm sitting here saying, okay, there's no doubt I've got you alleging that people are injured.

Now, they have to have criminal intent. They have to intend to defraud or to create a scheme or artifice to defraud of money and property now, unless they've got a bribery scheme under current Supreme Court law. All right. And I'm trying to see how does that play in terms of how do you prove intent.

MR. TUSA: Your Honor is staying on the RICO so I can appreciate that. I believe you're asking us what we believe the schemes -- your Honor, in your prior opinion, spoke some about RICO and scienter. Your Honor cited the appropriate test in the Third Circuit and it is actual knowledge or reckless disregard.

We don't understand, I say we, I mean plaintiffs, we don't understand that a prerequisite for a RICO claim is that every one of a defendant's customers must be the victim of a particular scheme, and I don't know that your Honor is suggesting that.

THE COURT: I'm not suggesting that.

MR. TUSA: I mean, in Wachtel and, of course, the 11th Circuit's decision in Clay, very similar case, yes, it was essentially every single doctor, or Wachtel's case, I believe every single private insured in that particular

case.

Now, it doesn't have to be that case. Now, your Honor recognized under the Third Circuit's standard of scienter it could be actual intent or it could be reckless disregard, and I think -- I don't know that we have enough right now to say actual intent because we haven't certainly gotten that discovery, but I think what we do have, and I think what we have demonstrated certainly to the Third Circuit's Hydrogen Peroxide standards, Quest has said this should never happen. They now just said this happens millions of times.

We are either to suggest that that is a standard of deviation, we as the plaintiffs, and the Court is willing to live with, or they are intentionally turning their head the other way and not realizing this massive mistake, which coincidentally financially benefits them and hurts the class and consumers. Lucky for them, I suppose.

I believe it's our opinion that they either know or should have known they have intentionally disregarded this major error and that's enough for scienter for a RICO claim. Your Honor is asking about RICO.

Of course, the other claims we seek for both this post-EOB billing class and some other classes are non-RICO-based, they're also non-scienter-based. But your Honor is asking about RICO. I can appreciate that.

I think that is our answer. They have a department that deals with this. They are supposed to get this right. They are telling you that they do get it right.

And now they're telling you that millions of people have been billed in excess of EOB, paid in excess of EOB, and we've heard no statement that they got their money back. Certainly Mr. Grandalski didn't.

Why should we give them the benefit of the doubt and say these millions of people, these millions of errors, hundreds, thousands, millions a day, why should they be permitted to retain that money? That's not their money.

Now, that's perhaps more of an unjust enrichment concept that's equitable. But if they have intentionally disregarded what is under their noses, that's scienter. That's knowledge. That's fraud. I think that's our position.

THE COURT: Let's go to the unjust enrichment class. To a certain degree doesn't that get us back into specific contractual provisions and state laws barring balance billing?

MR. TUSA: I'm sorry, your Honor. Someone opened the door. I couldn't hear your question entirely.

THE COURT: Doesn't that get us into issues of specific contractual provisions about balance billing and, likewise, issues about state statutes dealing with balance

billing?

MR. TUSA: No. It is certainly plaintiffs' position that it does not. Why? Again, we come back to what the defendants repeatedly have said. You don't need to look when you adjudicate a claim, when you send out a bill, you don't need to look at the provider agreement. You don't need to look at the state balance billing law.

Certainly they don't look at those things when they send out their bills everyday. They look at the EOB. According to their expert, Dr. Dyckman, we quote in the paragraph exhibit chart two, the EOB reflects all of those things.

Mr. Melodia said at the hearing last time all of those things are wrapped up in the EOB. If it weren't the case, it would be such an unwieldy system, we would never be able to send out a bill. If they had to look at the contract, the state law, every time they wanted to send a bill, they would never send out a bill, certainly not a timely bill. All of that information is wrapped up in the EOB.

Mr. Melodia said we are dependent on the EOB. The EOB says what you owe, what you can bill, how much you could bill.

Of course, unjust enrichment is an equitable remedy. It says they have money that they should not have had and

they should return it. If you have paid more than the EOB says you owe, if you paid it, if they have not given you your money back, they are unjustly enriched. From the matter of equity, they should give the money back.

THE COURT: What happens if you got two carriers, primary and secondary?

MR. TUSA: I'm sorry. Is your Honor done with this question?

THE COURT: Yeah. What happens if you've got two carriers, primary and secondary, and they both issue EOBs?

MR. TUSA: I presume your Honor's question is such that the first carrier allowed Quest to bill and the second carrier said no. I presume two carriers with different results.

THE COURT: Let me put this way. Have you ever had two carriers?

MR. TUSA: Personally no, your Honor. But some of our plaintiffs do. I'm familiar with the scenario. Primary insurance, secondary insurance, happens to a lot of people on Medicare.

THE COURT: Coordination of benefits issues.

MR. TUSA: Sure.

THE COURT: If they bill in excess of an EOB, does that necessarily mean that they have in fact improperly billed?

MR. TUSA: The answer is still yes, and the reason is if the secondary insurer adjudicates the claim after the primary insurer adjudicates the claim to determine that there is no responsibility because they had an agreement with Quest, and that adjudication is reflected in their EOB, no. If the answer is zero, you shouldn't be billing.

Now, maybe Quest desires a little bit of leeway. Maybe it should have a couple of -- it gets -- according to Mr. Hanlon, they know all insurer cash received, all patient cash received, so, maybe you say, fine, they should have some time after the second EOB to make this right.

We're willing to let Quest say, fine, we gave these people their money back because there were two payers.

That's not what they've said. I don't think they denied that if the secondary carrier is a contracted carrier, participating providers, they have to also comply with the secondary carrier, the first carrier. They don't distinguish between their legal obligations to comply with both.

I don't think they also agree with the fact that those obligations are also wrapped up in the EOB. If there is a difference, Quest has to comply with it because they're both participating carriers. They're both contained in the EOB.

At best, at best, and this is not Mr. Grandalski's

scenario, but at best they bill, they receive some money. They shouldn't get it. They should give the money back. And if they didn't refund it, they should refund it.

I don't see any other scenario that is equitable, if you're talking about equity, and if you're talking about legal, acceptable under the state consumer --

THE COURT: What I'm asking is do I have to -- forgetting then about state statutes. Do I have to look at the contracts?

MR. TUSA: I don't think you do.

THE COURT: Do I have to look at coordination-of-benefit issues?

MR. TUSA: We don't think you do. And the reason -- I mean, I could give you a different explanation, but I keep on coming back to what defendants said, their expert said, their counsel said.

If they had to look at all of those things when they sent out a patient bill, it would never work. The whole system of patient billing that I guess we have and Quest has would never work.

All of those things are contained in the EOB because, you know, to borrow defendants' terms, it's in its hearing exhibit 2, the insurance provider is the adjudicator. That's the term they use. They know all of those things. They have incorporated all of those things.

The EOB is the only document you need. That, when we redefine these classes, we considered your Honor's manageability concerns, and that's the document you need.

Now, listen, I realize Quest will say, both in response to this motion and probably any class motion, not doable, not doable, too difficult, too big, too unwieldy.

THE COURT: I think your prediction is a hundred percent correct.

MR. TUSA: Thank you very much. I've also read their papers so I'm cheating a little bit. But I think we need to hold them to their prior representations which, quite honestly, at least in this context are right.

THE COURT: Okay. Let me just, a couple of other quick questions that I want to ask you, then I'm going to give defense counsel a very brief time to be heard.

Let me ask this. The debt collector class --

MR. TUSA: Yes, your Honor. I'm listening. I want to change charts. Please go ahead.

THE COURT: I'll make sure I get the mic a little bit closer to me. Do you have another chart for me?

MR. TUSA: Two, but go ahead.

THE COURT: Okay. You're going -- I will tell you, for the future, you're going to have to make charts for geriatric judges. All right. That's way too far for me to see.

MR. TUSA: That's why we have the handouts as well.
THE COURT: Okay.
MR. TUSA: So that you have them in front of you as well.
THE COURT: Now, I've got essentially two claims in your debt collector --
MR. TUSA: Yes, we do.
THE COURT: -- class right now. One is misleading threatening language.
MR. TUSA: Yes.
THE COURT: All right. Either threatening something which they were not authorized to do or threatening something which they had no intention to do.
MR. TUSA: True. Yes, your Honor.
THE COURT: All right. And the second is charging unauthorized fees for collection essentially.
MR. TUSA: Yes.
THE COURT: And as I understand it, by the way, I've got Quest and the debt collectors pointing figures at each other as to whose the source of these bills.
MR. TUSA: Certainly not necessarily at one another but at Quest, yes.
THE COURT: Okay. If I recall correctly, I've got five debt collector defendants. Is that correct?
MR. TUSA: Well, you dismissed one.

MR. CIPPARULO: There's five left, your Honor.

THE COURT: There's five left. Good. All right. I had granted summary judgment with regard to one of the plaintiffs already.

MR. CIPPARULO: That was Credit Collection Services, your Honor.

THE COURT: Okay. Now, I've got two other plaintiffs. Is that correct?

MR. TUSA: The representatives for this class?

THE COURT: Yes, for this class.

MR. TUSA: Three, actually, your Honor. Mr. Grandalski, Miss McKenna and Mr. and Mrs. Ranieri.

THE COURT: Okay. And they received dunning letters from how many defendants?

MR. TUSA: Mr. Grandalski from two different defendants, Quantum and Credit Bureau Central, and then the other two class reps, Miss McKenna and the Ranieris, from American -- AMCA, American Medical --

THE COURT: Okay.

MR. TUSA: So, three total.

THE COURT: So, I've got two debt collector defendants in this case who nobody makes any allegations against.

MR. TUSA: I think not that we don't make any allegations. We don't have a class rep that dealt with

them.

THE COURT: No, I don't have a plaintiff. I do not have a plaintiff who makes any claim against them.

MR. TUSA: And you're referring to --

THE COURT: It's not a question of standing. I know you're arguing it as standing but, in short, it's one thing whether or not you have standing to assert a cause of action under law of state A, B or C.

It's another thing to say we've got a defendant in this case who nobody is a class rep against.

MR. TUSA: Okay. Let me -- I think your Honor is asking me the following two questions. Let me try to be succinct about it.

You're asking if we have a class rep that dealt individually with defendant RCA or SSB, and the answer is we do not. Okay. I want to be clear about that. We don't proffer anybody who dealt with them.

Why do we think that's okay. I think that's what you're asking. The scheme or artifice is the same and, you know, I think what our position is, the legal claim is the same, albeit the defendant is different.

We have -- it's our opinion, and we rely in no small way on your Honor's opinion in Sheet Metal Workers, citing Ortiz v. Fibreboard, saying if the classes were certified, there would be class members who would have dealt with them

and, therefore, it's a sort of cart-before- the-horse argument.

That's our view of it and, so, we do believe it's a standing defense.

THE COURT: If I recall correctly, all right, it's one thing to say, hey, I've paid your bills and the issue is whether or not I've got standing under a particular statute to pursue a claim against you, and to say I've got nothing from you.

And let me ask you this. Suppose I had no plaintiff. Suppose I had no plaintiff against any debt collector, no one who ever got dunned. Could I have a class action against the debt collectors for engaging in a scheme?

MR. TUSA: I think you'd lack practicality because nobody would have had that common legal problem. I mean, so -- but I don't think that's our factual scenario.

THE COURT: But how do I deal with typicality, for example? How do I deal with atypical defenses, for example, where there's nobody who in fact purports to assert a claim against two defendants in this case?

MR. TUSA: Well, I think the answer is somewhat dependent on what legal claim we're speaking about. If we're speaking about the FDCPA --

THE COURT: That's what I'm talking about. That's what I'm talking about.

MR. TUSA: It's a strict liability statute and, by the way, my two charts here, your Honor correctly identified the two things that we now still complain about.

We wanted to, in charts five and six for defense counsel, point out the fact that charging threats are expressly verboten by (e)(5) and (e)(10); adding additional penalties expressly verboten by (e)(2) and (f)(1).

I just wanted to make that clear, that what we're complaining about now are really the most rote of list enumerated FDCPA defenses.

Strict liability statute, this Court's decision, I don't mean your Honor, I mean this district's decision in Pace, the Supreme Court's recent decision in Germane, whether or not -- and I think our point for our class is it's the conduct that's the mistake and the conduct is the same.

We have plaintiffs who were victims of the conduct. They all did the same things. They were all working for Quest. We think that's the answer.

Now, your Honor, I understand what you're saying about those two --

THE COURT: Could they sue every debt collector who engages in that kind of conduct even if they weren't associated with Quest?

MR. TUSA: I'm sorry. They being who, your Honor?

THE COURT: Your three reps.

MR. TUSA: Well, I think if there was a commonality in the violation, the answer is anybody who -- well, if you're saying if they were not dealing with Quest?

THE COURT: Yeah. I mean, suppose, for example --

MR. TUSA: Fair enough.

THE COURT: Let me give you my hypothetical, all right, which is, if I recall correctly --

MR. TUSA: Yeah.

THE COURT: -- you specifically defined me out of your class, didn't you?

MR. TUSA: I don't believe we did but when your Honor raised the issue, we did waive recusal.

THE COURT: Okay. Let's suppose I am a member of your class. All right. Now, I get this letter which tells me to pay $10 in collection fees.

I am indeed properly outraged and I sue that debt collection agency and, you know something, I am sufficiently outraged at this practice so that I conduct a diligent search to find out the name of every other debt collector in the country who tacks on collection fees and I sue all of them in a class action, saying each of them, as a regular practice, adds on $10 in collection fees to their dunning notices and bills.

It's the same practice. It's the same scheme. It's

the same legal issue. Can I get certified?

MR. TUSA: I think there are certain notions that, yes, you can get certified.

THE COURT: Okay.

MR. TUSA: Now, would every --

THE COURT: Now, let's put it this way. At least I have your position, which is that, at least in my view, if I placed it as a reductio absurd, you're still willing to go along with it.

MR. TUSA: Your Honor, I don't believe it's that absurd. I will have to say, quite different from your Honor's factual scenario, we have another tie-in characteristic in that all of these companies were doing this under the supervision of Quest. I don't believe the case law says, however, even in the FDCPA context, that the debt collectors' practice must be tied to a single client.

I mean, except in the scenario where a debt collector purchases the debts and collects on its own behalf, they're working for a particular creditor. I don't believe the cases supports the notion. Certainly, I haven't seen that. I might be more fair and say it like that.

Where the debt collector really is tied to one particular creditor, it's the violation that they're going after.

Briefly, while we're on the subject of the FDCPA, I

want to bring to your Honor's attention something we did say in our briefs. This past April the Supreme Court decided the Germane decision. It was the court's latest FDCPA decision, somewhat insightful on a number of points at issue here. For instance, it rejected the bona fide error defense.

Also very importantly, it expressly recognized -- the Third Circuit had done this as well -- but for the first time the Supreme Court expressly recognized a practice that is deceptive, unfair or misleading under the FDCPA is also as such under the FTC Act and, of course, your Honor is well aware we have little FTC Act claims, which is why, of course, for this particular class we don't only seek certification under the FDCPA, we also seek certification under the state consumer protection laws, because if it's deceptive, it's still deceptive.

That was previously the Third Circuit's position in a case called FTC v. Check Enforcement. It's in our brief. I won't belabor the point. I know your Honor is looking to wrap up. I just --

THE COURT: I'm not going to cut you guys short. All right. Let me just stop you for one second.

(Discussion off the record.)

MR. TUSA: A few words, your Honor, on our class, the Anthem Blue Cross Blue Shield class. There was no doubt in

your Honor's last opinion that your Honor was of the impression that a class dependent on too many contracts and too many state laws was not going to fly for class certification, certainly not in this court.

We took those statements to heart. We have a class, one provider agreement, one sub-plan. And the defendants have made the point, and I just want to address this real quick, that Mr. Grandalski, even though a member of the plan, could not be a third-party beneficiary to raise a breach-of-contract claim.

This is the only class for which we have a breach-of-contract claim, and we set out here, your Honor, from the contract -- this is also Tusa exhibit 10, but here is the hold harmless clause. Here is the definition of payment covered services member, and it very clearly says laboratory may not -- I'm paraphrasing -- may not bill for anything other than copays for deductibles.

We know for Mr. Grandalski that was $20 in all four of his instances. They billed him for $30. It says expressly, laboratory agrees this provision shall be construed for the benefit of the member. That's Mr. Grandalski. The contract says expressly it's for the benefit of the member.

Now, this is -- we agree that Connecticut law applies.

THE COURT: What subdivision is this?

MR. TUSA: This is my chart exhibit four. It's also the full agreement is Tusa exhibit 10.

THE COURT: What subdivision of the contract?

MR. TUSA: I'm sorry, your Honor. It is -- let me pull out the full one. The hold harmless clause is section 2, sub B, sub 4. Are you with me, your Honor?

THE COURT: I got it.

MR. TUSA: Okay.

THE COURT: Mr. Melodia, it looks like you've got a contractual provision interpretation issue here.

MR. MELODIA: Well, at best, I think, your Honor, we've got a factual issue around this contract.

I think, more importantly, in looking at the papers preparing for today's hearing, it's not clear to me at all how this contract found at Mr. Tusa's exhibit 10 or today's exhibit 4 even applies to their sole named representative, Mr. Grandalski.

It's not clear to me that this plan even covers Grandalski. Grandalski is in Nevada. He's a federal employee. It's not clear to me that this contract is one that governs federal employees or Mr. Grandalski in Nevada. I don't think --

THE COURT: Let me ask you a more fundamental question. With regard to a class consisting of members who

are only covered by a particular plan, the Anthem plan, a particular contract in the Anthem plan, if I recall correctly --

MR. TUSA: Yes, your Honor, and exhibit 11, the next one, is the amendment that deals with federal employees.

THE COURT: Okay. But really when you get right down to it, isn't that an issue which goes purely to the merits of the claim?

In short, you may have a summary judgment. You may have a motion to dismiss on, you know, depending on the actual language in this one plan. But does that go to any of the issues which fundamentally deal with class certification?

MR. MELODIA: I think it does very much, your Honor.

THE COURT: How so?

MR. MELODIA: They like to call this a post-EOB class, as if all we need to do is look at the EOB, as we've heard, and if there's any bill as to that EOB, it's automatically wrongful and improper.

But we know that not to be true and we know that not to be true by looking at the actual named plaintiffs they've put forward during the six years of this litigation, including continuing to put them forward as members of this class, this post-EOB class, at exhibit 25 to Mr. Tusa's declaration.

So, to go to your Honor's question, take the Agostinos. Why do we need to look at the Agostino payer contract and understand what's in it versus what is in hearing exhibit 4, which we believe to be actually the Breuer-Auclair plan, not the Grandalski plan, but in any event, whoever it applies to, and we still don't know six years into the case, the point is you need to look at different contracts in order to understand, for example, whether the Agostinos have a claim and are in the class at all, not merits, but whether or not there's membership in the class; ascertainability and specificity around class definition.

The Agostinos' contract, it turned out, was with a nonparticipating payer. That makes all the difference in the world as to whether they're in or out.

THE COURT: Well, you haven't contested that, was it Mr. Grandalski's contract is with this particular, this Anthem plan, have you?

MR. MELODIA: I am right now, your Honor. I apologize, but in looking at the exhibits in preparation for today, I don't see where the exhibits being put in front of you as the plan is one that necessarily applies to Mr. Grandalski.

THE COURT: Okay.

MR. MELODIA: In any event, there's not an Anthem

plan. We all know that. Remember last hearing, we looked at the Illinois Attorney General exhibit and we saw how many plans there are.

THE COURT: So, if I certify this as to the contract which Mr. Grandalski is a beneficiary of, whatever it may be, does that solve the problem?

MR. MELODIA: Well, it doesn't. I mean, it solves a problem.

THE COURT: What problem doesn't it solve?

MR. MELODIA: It doesn't solve the problem of the very practices, the mish-mosh of practices that are issue; the lack of a scheme, the lack of scienter under RICO.

THE COURT: Just a breach of contract. What I'm asking you is, forget the bells and whistles for a second. Okay. Excuse me for characterizing a civil RICO claim as bells and whistles.

MR. TUSA: No offense taken, your Honor.

THE COURT: Forget the bells and whistles. A breach-of-contract claim with that gentleman as a class representative for people who are covered by that contract who were billed in excess of their EOBs, pure breach, what's the problem with that?

MR. MELODIA: The problem is that, as the Court suggested earlier in a question, every time there's a bill in excess of an EOB, it's not a breach, and it's not an

improper practice.

Now, I'm not arguing merits. I'm arguing what does the Court need to look at in order to determine whether there's a breach of contract, and that analysis requires not just looking at the plain language of the contract, but requires the exact documents that plaintiffs don't want to put in front of the Court anymore because your Honor already accepted in your earlier opinion in February of '09 that, in fact, you would need to look at the requisition and all the pre-EOB activity.

Why do we need to look at it? We need to look at it for the reasons that are obvious when looking at Mr. Tusa's exhibit 25, that go through the various proposed members of a post-EOB class.

We need to understand why they were billed more than an amount stated on an EOB. One of the reasons, for example, might be the situation your Honor brought up, Cruthers, which is competing EOBs from two different carriers.

Our expect, in fact, did not say what was characterized by Mr. Tusa earlier. Our expert said that a secondary carrier can't tell a primary carrier what to bill and can't direct Quest and, so, Quest is in the middle. That's one scenario, that coordination-of-benefits issue.

Another scenario is where there are multiples EOBs

conflicting with each other from the same payer. We have that scenario in this case with Hoecher. We have with Ms. McKenna, one of the named representatives put forward by plaintiffs today six years into this litigation. We have three different scenarios.

THE COURT: Got it. Okay. We're going to take a half-hour break because I wouldn't dream of shorting any of you in this interesting issue. All right.

(Recess is taken.)

THE COURT: Okay. Mr. Tusa, I pretty much kept you on the hot seat for this morning, so, before we give defense counsel an opportunity to experience that, is there anything which you wish to add which you think you may have missed or that I may have missed?

MR. TUSA: Three very brief points, your Honor.

THE COURT: I'm sorry?

MR. TUSA: I just want to make three very brief points.

THE COURT: Go right ahead.

MR. TUSA: Some topics we have not touched upon and then I will gladly cede the floor.

THE COURT: Okay.

MR. TUSA: When we broke we were talking briefly about the Anthem Blue Cross Blue Shield contract. Mr. Melodia expressed his opinion that he thinks maybe we're

talking about the wrong contract because it doesn't mention federal employees.

I would mention two things. Exhibit 11 to my opening declaration is the exhibit to -- is the amendment to the contract in exhibit number 10, expressly incorporating federal employees, so, we think it is the right contract.

The other only point I make is this is the first time we're hearing about it. We got these documents from defendants and we didn't hear in their opposition papers that they thought we had the wrong contract. If that's the case, we're hearing it for the first time.

Secondly, I won't belabor the point. I had one last hearing chart, your Honor, and it sort of dovetailed into the two issues about Medicare and intervention and we'll largely rest on our papers on these issues.

You know, your Honor might recall I have a motion pending to intervene one new plaintiff who would be our class rep for the Medicare class. It's our position that she satisfies the lone problem you had with our last Medicare representative. She undoubtedly was Medicare covered, was billed and paid. It was the unpaid part that your Honor had a problem with last time. Miss Camaj would satisfy that one problem.

Defendants don't take issue with any of what we believe is relevant. They pretty much attack her by

suddenly coming up with an advance beneficiary notice. This is all primarily in the papers, if not in the class motion papers, in the intervention motion papers.

The only additional point I'd like to make is defendants filed an unapproved surreply and I don't know if your Honor is going to accept it, not accept it.

I just have one thing to say about it. We had made the position in our reply papers in support of intervention to allow Miss Camaj in that while it seems that Quest has suddenly found this ABN after a year of Miss Camaj asking her for it, it's clearly defective on its face for at least two reasons.

Number one, they never gave her a copy of it, and that is an express requirement under the Medicare laws. And number two, if you don't give somebody a copy, the ABN is absolutely defective, and that's what the chart says.

THE COURT: Let me ask you this, though. One of the things about the Medicare class was cohesiveness and manageability issues.

This issue about the ABN raises two issues. One is whether or not -- actually raises a number of issues but first, one issue is whether or not she's an adequate class representative, since your class is defined as people for whom no ABN had ever been issued, if I recall correctly, not a class consisting of people who either had no ABN or

had defective ABNs.

Secondly, assuming that it were expanded to deal with that situation -- well, let me put it this way. First, does it potentially raise, among other things, whether or not she is not an adequate representative because she is subject to atypical defenses which the class would not be subject to -- let me continue -- and third, if this class were to include both people for whom no ABN had ever been issued and people for whom defective ABNs were issued, doesn't that create an issue of, in fact, embroiling this Court in individualized analyses of each individual claimant's position, particularly whether or not an ABN was defective, not defective or, indeed, as the defense has argued and, quite frankly, I don't remember it's in their surreply or whatever, but I do know that they had argued that under Medicare rules, if the beneficiary in fact has actual notice that the procedure is not covered, then even if they got a defective ABN, they are still properly billed. At least that's my understanding of what their argument was.

MR. TUSA: Your Honor asked a number of questions. I want to see if I could answer them all.

Let me take your last one first. Do they have to issue an ABN. We don't think there's any doubt that these are the Medicare regs. We've attached these, by the way.

The provider, practitioner or supplier must issue an ABN each time and as soon as it makes an assessment that Medicare payment certainly or probably will not be made.

We think they're just wrong. We think you must.

Now, you ask -- your Honor asked me a different question. Your Honor asked me a question about whether or not -- let me take a step back.

Miss Camaj and her physician asked Quest for copies of this ABN for eight months. They continually told her it didn't exist. We proffered her as a class rep.

After they told her it didn't exist, she asked Medicare. Medicare said we don't have one, either. Okay.

So we proffered her as a class rep. Lo and behold, even though Quest apparently misrepresented itself to Miss Camaj and her physician a number of times, they found one. But they attached it to Mr. Diffley's affidavit.

We took a look at it and to our eyes it's materially defective. And you asked me what's the import of that.

Our class is defined about people who don't have an ABN, and it's our view that if the ABN is defective, it doesn't exist at all. It's void. It's a nullity. It doesn't exist. So, in our view she can be the class rep.

But I think this is one of those Hydrogen Peroxide issues that your Honor has to deal with. I think this is one of those instances where the facts, the merits overlap

with the class determination and I think we need an individual determination as to whether or not she individually is a proper class representative.

If your Honor decides that the ABN was, in fact, defective, as she swore it was because they didn't give it to her, we have other reasons why it's defective. They listed the wrong test. That's neither here nor there. They both are individual to her. And you decide that the ABN is defective, it's a nullity. She doesn't have an ABN, she can fit into the existing class.

THE COURT: Then my question is this: What is my class now? Is my class a class of people who have never gotten an ABN or a class of people who have never gotten an ABN or, alternatively, have gotten defective ABNs?

MR. TUSA: Thank you very much. That's the question I was getting to because that's another question your Honor asked.

Once again, we were somewhat taken by surprise about this issue because defendants didn't give it to Miss Camaj when she asked for. They also didn't give it to her at the time she had it, so, of course, we never saw it. That's why our class was defined the way it was.

Your Honor asked could the class be changed to say people with either no ABN, like our initial class representative, Miss Cassese, or a defective ABN. That is

one way to deal with it. Again, this issue was somewhat thrust upon us with defendants' opposition papers.

We think either alternative is fine and we don't think -- there is another question pregnant in your Honor's question and, that is, did they just not give her the ABN or is it their policy not to give the copies to anyone.

If that's the policy, then it really is uniquely appropriate for class.

Now, I will tell you when she put in her declaration, said I never got a copy of this and that's the rule, defense put a surreply and their response was, oh, yeah, we gave her a copy.

No, they never said that. They don't dispute she never got a copy. That alone voids the ABN.

I'll say there's another issue that voids the ABN. They listed the wrong test and this is somewhat technical, and I don't expect -- you really need the papers for this one -- but they listed the test as one code. It was another. We read their explanation from Mr. Diffley and his surreply affidavit, and I will -- I just want to put on the record this one point.

If you look at Tusa exhibit E in support of intervention, the reply declaration, and compare it to Mr. Diffley's Exhibit 6, which is with his surreply, this lists tests for the two codes, and we still believe they're

different. I know they believe they're not different. But we believe they describe one test to her and reported reimbursement to Medicare for another.

I believe those are all the points I wanted to briefly touch on today. Thank you, your Honor.

THE COURT: Thank you. All right.

MR. MELODIA: Where do I start after an hour and a half? I'll try to be brief and responsive.

THE COURT: Let me put it this way. Okay. Your job is to persuade me, not to go through your checklist. I've been asking Mr. Tusa some fairly tough questions as we've gone along here, and Mr. Tusa has indeed been doing a superb job of responding and arguing.

So, deal with his responses. In short, forget about what any prepared outline you might have might consist of. I've read the papers.

MR. MELODIA: Yes, your Honor. Let me start at the end with the Medicare point and Miss Camaj as potential intervenor here.

Of course, any intervenor has to have some claim in the case, some cause of action, some interest which has been affected, whether we're looking at Rule 15, 20 or 24, (a) or (b).

That's very much in question here, and we've heard again many of the reasons why that remains very much in

question here today.

It is clear that Miss Camaj has not said that she did not sign the ABN. She never says in her declaration that she did not sign it, that that's not her signature, that that is not an ABN which she signed prior to the test being given and any billing.

And of course, that's the test. And I appreciate what Mr. Tusa thinks Medicare regulations should say, what they should be, but the reality is what they are, is that this legal analysis turns on whether or not Miss Camaj had prior knowledge in any form that Quest might send a bill for this service. And of course, Miss Camaj did. We know that, and that's not disputed.

What's disputed is whether she received a copy, and Mr. Tusa says that he and she were surprised that Quest came forward with an ABN and, yet, she doesn't say she didn't sign it.

We were surprised a year after your Honor's decision that Miss Camaj came forward as a potential named representative in this case, and we have no evidence that Miss Camaj or her physician ever called or contacted anybody at Quest.

We have seen her improper contact with CMS, attempting to get information that CMS would not have and CMS told her and the physician that they would not have.

As important, Quest has a determination from CMS prior to billing her that says please go ahead and bill her, a Medicare patient. So, Miss Camaj has no claim but this isn't an improper merits argument. This is an argument about what is required under their class definition as modified in their briefing and argument today.

Now, if we go back to what your Honor said is actually in the stated definition, it talks about whether somebody did or did not sign an ABN, and we have a signed ABN, so, Miss Camaj can't intervene on behalf of that class. She can't be adequate. She can't be typical. We know that.

THE COURT: Okay. Let me stop you there.

(Discussion off the record.)

THE COURT: I apologize. I'm trying to multi-task.

MR. MELODIA: Fair enough, your Honor. Just to continue and finish briefly on the Medicare issues that have been raised, even if there were, which there is not, some factual question about what happened and whether or not Miss Camaj has some claim, under their modified class definition, in order for Miss Camaj to have any claim and any standing before this Court at all, it has to be on the basis that her ABN was somehow defective, to use Mr. Tusa's word, or not valid, and that determination we know will

require looking at individualized facts in a way that, when the Court was looking at Miss Cassese's situation and the no payment there, you did not have those facts before you.

Your Honor looked previously and found that Miss Cassese, the previous named representative put forward by plaintiffs on behalf of this purported class, was not typical and not adequate because she had not made a payment.

Mr. Tusa seemed to think if he could find anybody who had made a payment on a Medicare bill, that automatically they would therefore step in and become a valid class representative.

Clearly that's not -- that does not follow logically from the Court's prior opinion, and the Court before was not presented with this validity and defective argument before, and your Honor was not presented before with the language of what is actually required by the Medicare regulations in order to determine whether or not Quest has a right to bill. It is not true that every bill is wrongful.

THE COURT: Now, let's move on to the proposed breach-of-contract class.

MR. MELODIA: Good. I understand from your Honor's questions prior to our break that -- I won't presume to know where your Honor is in your rulings or thinking.

THE COURT: Don't even guess.

MR. MELODIA: I'm not even going to guess. And I have ripped up my prior outline. So, let me go to what I understand, though, to be Quest's hardest case, our toughest position, which would be single claim breach of contract, single payer contract, and single state.

That's Quest's toughest case. If we can persuade you that that class is not certifiable, then clearly everything else in the post-EOB class cannot be certified because we know there are -- your Honor's already ruled in February of '09 concerning the differences in state contract law. So, if there are different contracts at issue, that goes away.

We've already had a discussion about scienter and RICO and a whole lot of other things.

If we focus and assume, let's assume, take away the issue of whether or not exhibit four, hearing exhibit four, and the Anthem contract put forward is or is not covering Mr. Grandalski. Let's assume it is. And let's assume further that the third-party beneficiary argument in our brief is wrong.

THE COURT: Or alternatively is --

MR. MELODIA: In dispute.

THE COURT: -- frankly a pure merits issue which does not destroy certification.

MR. MELODIA: We have at least three issues that

still make class certification of that class impossible.

First, in order to determine the issue, even if the contract is as clear as plaintiffs say it is on the third-party beneficiary issue, and even if on the plain language of the contract defendants' position is incorrect, that does not mean that contract gets enforced under Connecticut law, if there's a hold harmless provision in the state statute which differs or if there's other law, statutory law in Connecticut which would need to be looked at. Point number one.

We would need to look at what does Connecticut law say about these issues and is this contract language enforceable.

THE COURT: But dealing with that, quite frankly, that deals with cohesive -- having to look at individual state law deals with cohesiveness issues, deals with manageability issues, in fact, deals with whether or not a class action is preferable to other means of resolving it.

All right. If I'm looking at the law of one state, that doesn't present those issues. It may very well be that on the merits is a determination by the Court that there is or is not a cause of action. But that's what looking at Connecticut law implicates in terms of, you know, proceeding with a class action.

MR. MELODIA: Fair enough. Let's take the

choice-of-law issue completely off the table for these discussions. We still have at least two problems here.

One is, there's been a lot of discussion about the EOB and how the EOB is sacrosanct and always right and must be relied upon. That's essentially plaintiffs' position.

They say it's our position, and they provided some quotes in one of the hearing exhibits today during the course of this case in which we didn't say that.

What we said was, and what we continue to say, because our position in this six-year case has been consistent, we say that the EOB is important, Quest is dependent upon it, and it is absolutely true, as Mr. Diffley and others testified, that Quest does not go back for the 500,000 bills it sends a day and check every payer contract and have discussions with physicians and look at requisitions and do everything else that's involved in that understanding of an individual transaction in order to send a bill.

We do map our systems to meet payer contracts but, more importantly, we do rely on EOBs. We're dependent on them. That's true.

That is utterly different than saying that everything that went into an EOB is irrelevant, and everything that happened before an EOB was issued is irrelevant. And it's utterly different than saying every EOB is correct.

We know that's not true. We know that's not true in this case and, therefore, it follows that it's also ridiculous on this record to claim that every bill that's sent above an EOB or different than an EOB is improper. It is absolutely false.

How do we know that? We look at the plaintiffs and the transactions that Mr. Tusa has put before us. We look at exhibit 25 to Mr. Tusa's certification, and we look at Hoecher, we look at McKenna and we look at Haley, to take three examples where EOBs were wrong.

We also look at Cruthers. We look at Cruthers because she had competing EOBs from different carriers, the scenario that the Court talked about earlier.

Therefore, it is incorrect and a false premise to start basing a class on to say that simply because Quest billed an amount different than an EOB, that that automatically becomes improper or unlawful.

Why is that important? Because then all of the findings of this Court from February of 2009 become relevant again. Everything your Honor found earlier about needing to look at the requisitions, needing to look at all of the documents leading up to the EOB are very much still at issue.

And again, I'm not making this up as a defense lawyer to make this unduly complex. I am tracking the evidence of

record in this case, mainly presented by Mr. Tusa, but also from the expert, Mr. Dyckman. So, that's point number one.

THE COURT: Let me ask you this. Suppose in a single state with a single contract you have provisions which say that Quest shall not balance bill any beneficiary who is part of the preferred provider -- of a preferred provider network or actually this preferred provider network which is the subject of this contract.

MR. MELODIA: Right.

THE COURT: You get an EOB and you bill in excess of the EOB -- the patient responsibility shown on the EOB. Okay. And let's assume that the contractual provision is, in fact, intended to provide the consumer with the rights of the third-party beneficiary under the contract. Let's also assume arguendo that the state law also says you can't balance bill in excess of what an EOB says.

MR. MELODIA: And that it covers Quest and laboratories and not just HMOs and all the other things.

THE COURT: Right. Assuming all of that.

MR. MELODIA: Yes.

THE COURT: Why would one have to go back looking through the history to do a straight breach-of-contract claim? In short, if I were the plaintiffs in this case, I would be saying to you, you know, the EOB is wrong. It's your job to sort out the EOB with the insurance company --

all right -- and it's your job to do it before you bill me, and if you actually billed me and I paid and it was in excess of what the EOB said, that's a breach of the contract and I was intended to be a beneficiary of it.

MR. MELODIA: Right.

THE COURT: What's wrong with that argument?

MR. MELODIA: Okay. Well, several things. One, obviously you're making a lot of assumptions and we don't and never have in six years of litigation had that scenario in front of us, so we don't have -- not only do we not have numerosity, we don't have a named plaintiff for that purported class. After six years, plaintiffs' burden on the last motion, plaintiffs' burden on this motion.

Number two, the closest we have to that scenario is a date of service for McKenna, September 26, '05, in which what we've called in prior proceedings a chubby finger error, a data entry error, has resulted in a bill going out for an amount in excess of an EOB. It went out for $604.02 instead of $60.40.

That clerical error fits all of your criteria, your Honor. That bill would be in your class and, yet, nobody can argue that there was a breach of contract that would hold up because McKenna, number one, never paid, knew that it was an error and never paid and, number two, let's talk about refunds, because in a breach-of-contract case we have

to have damages. We know that. And I believe the Court has previously held that in your earlier decision.

THE COURT: I don't think there's much doubt that there has to be an element of a breach of contract.

MR. MELODIA: There's no statutory damage here and it is also not true that simply sending a bill without any other action on the part of the plaintiff receiving the bill gives rise to a cause of action that would be valid under breach of contract or other theories, and nobody has pointed after six years to any law that says, you know, it is improper and a breach of contract to send the bill.

But let's assume payment, which we don't have in the McKenna transaction, or any other which fits your Honor's criteria, and then the question becomes was there a refund. And that issue, your Honor has already ruled upon under the FRD cite for the Agostino decision for February of '09, it would be 256 FRD at 471.

THE COURT: I remember that page precisely.

MR. MELODIA: I knew you would. And there are at least two quotes on that page which specifically go to the issue of why evidence of record in this case establishes that a refund does raise individualized issues and cannot be determined in any systemic way that relied on Dyckman, our expert, that relied on Hanlon, uncontradicted testimony, and it relied on the uncontradicted testimony of

Quest employees, Bowman, and I'm forgetting all the names, but there were three or maybe four, Frank Espinal, four depositions in which Quest employees said essentially the same thing.

THE COURT: Okay. Let me shift to another subject -- all right -- and it's going to implicate you at this point, both of you.

In short, and let's forget about the issue of the standing issues and so on. I got -- I do have plaintiffs who in fact have debt collection claims who are still in here, and they're of two different characters. Let's take first the additional fee.

MR. MELODIA: Okay. Your Honor, the debt collection claim is not against Quest at all. I don't know if perhaps my colleague can address these.

THE COURT: But you assert that in fact it was assessed by Quest.

MR. CIPPARULO: Good afternoon, your Honor. Yes, it was asserted -- it was tacked on or placed onto the collection by Quest. That is undisputed. Quest does not dispute that it placed on the collection fee prior to it being transmitted to the collection agencies.

And there are only two collection agencies that were even involved in this $10 fee. That would be Quantum and CBC, and it's undisputed that Quantum and CBC did collect

those fees if they were successful, but it's also undisputed that those fees were given to Quantum, given to CBC, with the fee added on by QDI, and QDI will not dispute that.

What is also undisputed is that the plaintiff does not have a suitable class representative because Mr. Grandalski testified, who is the only representative with respect to those Quantum and CBC, Mr. Grandalski testified in his deposition that he did not believe he had been misled by Quantum, so, there's now a fact specific defense that will not apply to --

THE COURT: Well, the charging of fees, does that depend upon being deceived?

MR. CIPPARULO: Well, one of the elements of the plaintiff is charging under the FDCPA is that it was a deceptive practice. Also, this has to be made very clear, and I apologize if it's not made clear in my papers, the fee has to be added on by a collector and that fee is not permitted between the underlying agreement between the creditor and the plaintiff or the consumer.

That's not the case here. This is not a case where the collector took a bill and said I'm going to put $10 on for my efforts to collect this fee. This fee was put on long before it ever saw the collector's desk.

THE COURT: Question, is that an issue which goes to

the merits as opposed to whether or not a class could be certified? In short, if indeed the routine practice of Quest was to add a $10 fee before it was ever sent to you and if that constitutes a defense under the statute, is that something which defeats class certification?

MR. CIPPARULO: Well, I think with respect -- that's one of the reasons why I brought up Grandalski, because there is a fact specific defense to Grandalski, but I think, understanding your Honor's question, I do think there has to be at least not an inquiry into the substantive of the claim but -- into the substance of the claim, but has to be some sort of inquiry into the mechanism of the claim, and I think the mechanism that the plaintiff relies on in his second amended complaint -- this is the one that he has filed with the Camaj motion -- suggests that -- not suggests -- states that fee was added on by the collector, and that's simply not the case.

THE COURT: What I'm suggesting to you is this: What changes this from being a situation in which I certify a class and you win a summary judgment motion? I haven't had summary judgment motions.

MR. MELODIA: Just one, your Honor, and you granted it.

THE COURT: Just the one. And what I'm suggesting to you, you know, I am permitted and, indeed, encouraged to

look at the merits of the claim but only for a particular reason, and that is to explore how the claim could in fact be established at trial and, therefore, whether it's susceptible in practical terms to being treated as a class. And that's the purpose for looking at the merits of claims, not to decide on the merits, whether somebody wins or doesn't win on the merits.

MR. CIPPARULO: I understand, your Honor. Thank you.

THE COURT: In short, I could certify a class which was the absolutely dead loser of all time and it could still be a properly certified class. Correct?

MR. CIPPARULO: It could be properly certified but ultimately be dismissed. I understand your Honor's question.

I think that you would have to also get to the question as to why some of the fees were added on and why some of the fees weren't added on, because it was not a unified practice.

MR. MELODIA: And that, your Honor, if I could --

MR. CIPPARULO: Please.

MR. MELODIA: -- add on to what's been said here, that was the assumption in your Honor's point, that there has been established in some way of record by the plaintiffs who have a burden on this motion six years into

the case to -- that there is a unified practice and that there is numerosity.

There is no showing on this record, there's absolutely no numerosity of record in this case. That's number one right now on this record something that prohibits certification of even this $10 add-on charge claim.

The other thing I'd point out is that there is no class that's been put forward by plaintiffs as simply about this $10 charge. That's an issue that comes out of the record and out of the briefing as something that is more discrete, and I understand why the Court raises it, but it is not something that plaintiffs have put forward as a simple class.

THE COURT: The Court's allowed to narrow classes and --

MR. MELODIA: The Court obviously can conform to the record evidence, as plaintiffs could have conformed their complaint over the past six years to the record evidence.

THE COURT: Okay. One second question, which is, as to the claims which essentially say deceptive wording in the dunning letter and, again, as directed at those collection agencies which, in fact, have a plaintiff who received a letter from those agencies, what prevents them from being certified as a class?

MR. CIPPARULO: That's -- I'll give you two arguments. I'm going to delve into the merits just briefly because it has to be stated, but regarding more the class argument, you have to look into subjective intent. Your Honor dealt with that extensively in the first opinion.

You have to look at the intent of each collector as to whether it was authorized to send this letter, whether it was an unintended threat.

It's not a simple form letter case, your Honor, which you're saying this language as a matter of fact is a violation of the FDCPA. Form letters cases are particularly susceptible to class certification. This is not a form letter case.

THE COURT: Well, how many -- I mean, to put it truthfully, and this may not be -- obviously, it's not in the record. I've never heard of a collection agency which does not have form letters, form letter A, B, C, D or E, but they tend to have progressive form letters as it were. Isn't that correct?

MR. CIPPARULO: Let me be clearer. You're absolutely correct. But the language of the form letter can be particularly susceptible to FDCPA claim.

For example, if you do not have the necessary warnings that are required by the FDCPA, you can contest that. If that language is missing in your initial letter,

that's an easy class to certify. Anyone who received that letter can be -- can be a member of the class.

THE COURT: Okay. As I understand it, the core of plaintiffs' claims are, apart from the $10 fee, are deceptive letters in that either they're threatening further conduct implicitly or explicitly, when no further conduct is intended or, alternatively, making such threats where they were not authorized by Quest to, in fact, engage in such conduct if there was no payment.

Now, I understand full well that, you know, that the statute stems from the good all days when the letter would say if you don't pay this, the funds in dispute by X date, we will initiate suit against you. All right.

The letters don't say that anymore, and when the letters did say that, it would be very simple to see whether or not there was an internal policy with regard to initiating suit, for example, a dollar cutoff, which is not uncommon, or alternatively, a procedure for specifically requesting preauthorization from the creditor.

Now, as I understand it, the letters in question here are less definitive. They tend to suggest further action without specifying what the action is. Correct?

MR. CIPPARULO: Further collection attempts.

THE COURT: Okay. And one question, of course, is, indeed, whether or not implicitly that is threatening legal

action, for example, and counsel for plaintiff have been very generous in citing case law to me which essentially says that, what we all know, which is that we are to view all the language in these letters in light of the most unsophisticated recipient and whether or not that unsophisticated recipient would indeed interpret it as a threat of litigation, for example. Correct?

MR. CIPPARULO: Least sophisticated consumer standard.

THE COURT: Okay. So, with regard to this language, one common issue would be whether or not, viewing it through the light of the most unsophisticated recipient, it would be interpreted as threatening litigation. Correct?

MR. CIPPARULO: I'm not sure that that's been pled. I think what's been pled is that -- what he's claiming is that we were putting a threat in our letter that we weren't intending to pursue.

THE COURT: But frankly, I assume that -- I assume, quite frankly, that the thrust of that was either going to be initiated litigation or, alternatively, initiating communications with a credit bureau, one or the other. Is that correct?

MR. TUSA: Your Honor is correct, yes.

MR. CIPPARULO: The problem I have with plaintiffs' argument is that he attaches letters from 2004, he attaches

letters from 1998, he attaches letters from 2001, but in the very papers that he relies on, if you look at his exhibit 15, he concedes that the first time it was even discussed in QDI as to whether they should even address these form letters or these letters with their debt collection agency isn't until 2005, so, the letters saying -- the statute says you cannot send a letter in which you have no intent to pursue or are not authorized to pursue conduct.

There's no evidence at all in this case that any of the debt collectors took any action that they were not allowed to pursue.

The first time it's even discussed, according to Miss Espinal's testimony, is in June 2005, and that's in the plaintiffs' moving papers, exhibit 15, specifically page 52 of Miss Espinal's testimony. So, how can you say that they were not -- that's why I tried to make the point before, you're going to have to look into the subjective intent of each -- of the writer of the letter because it wasn't even discussed with QDI in its debt collection until sometime in 2005, and the letters that he relies on in exhibits 16, 17, 18, 19 and 20 for various reasons are all dated pre-2005.

MR. MELODIA: If your Honor is done on that, I want to go back to the $10 issue for one moment.

THE COURT: All right.

MR. MELODIA: Because I think while your Honor may view this as too close to a merits issue or too unique or peculiar to Mr. Grandalski, the only person to claim this $10 fee having been added, we think it goes more to what Hydrogen Peroxide counsels, that is, how do I go about making a decision, what are the types of issues that could arise when I'm looking at the merits of a claim.

And, in particular, there are, I guess, three things I want to say. First, there's no allegation or at least no evidence at all before the Court that this $10 fee was in any way a national practice or practice for any extended period of time.

I already made the point about no numerosity of record. But in addition, I want to make the point that at most, what we're dealing with is a business unit, Las Vegas, for a very limited period of time where this charge is in question. That's point number one.

Number two is, we still have the question of refunds in this context, whether or not refunds were given post collection. There are circumstances where courtesy and other refunds are given, and we have had examples of that in the named plaintiffs, not Mr. Grandalski, but in other named plaintiffs.

THE COURT: Would that save -- would a refund save anybody from a Fair Debt Collection Practices Act claim

frankly? I doubt it very much.

MR. MELODIA: Probably not. It's not a breach of contract.

And I think the third point may go more to a breach-of-contract scenario, but I'm not sure about that. I just wanted to raise factually that we're in a setting, according to the record, with regard to Mr. Grandalski, where he owes -- and there's no real dispute that he owes $40 that he never paid to Quest, because the bills that were being sent were correct bills, consistent with the EOB, by the way, and he never paid them. We think because the address was wrong. Again, we go back to this garbage in, garbage out. If you have garbage in on the address at the front end, you end up with an EOB going to the wrong person, a bill going to the wrong person at the wrong address.

THE COURT: Thank you, folks. Look, I believe we've covered a lot of territory and you've been helpful.

Now, you get one last crack. Fifteen pages from each of you, no surreplies, no surreplies, no anything. All right. 15 pages simultaneously submitted, dealing with what you think are the most significant things I should now be dealing with. You've heard my concerns. Persuade me.

MR. TUSA: Your Honor, single spaced, double spaced?

THE COURT: According to our standard motion practice

rules. Okay. And the reason why I've got it at 15 is, I know you're all superb lawyers and it takes superb lawyers to write brief briefs.

I've already had your extensive ones. Now I need the short ones. All right?

MR. CIPPARULO: Your Honor, do I get fifteen pages for each debt collector defendant?

THE COURT: No, you don't.

MR. CIPPARULO: Okay, your Honor.

THE COURT: Thank you, folks. It's been a pleasure.

MR. TUSA: When will those briefs be due?

THE COURT: Talk about it between yourselves. All right. I'm sure this much you can decide upon. Okay?

MR. MELODIA: Yes, sir.

THE COURT: Thank you.

(Whereupon the proceedings are adjourned.)

B

C

D

E

F

G

H

I

O

P

Q

R

S